

EASEMENT FOR MAINTENANCE OF MECHANICAL EQUIPMENT

Prepared by and mail after recording to: Moore & Van Allen PLLC
100 N. Tryon Street, Suite 4700
Charlotte, North Carolina 28202
Attn: Evan M. Bass

STATE OF NORTH CAROLINA

DURHAM COUNTY

THIS EASEMENT FOR MAINTENANCE OF MECHANICAL EQUIPMENT (this “Easement”) is made as of the ____ day of _____, 2013, by and between the CITY OF DURHAM, a North Carolina municipal corporation (the “City”), and DATA RESIDENTIAL, LLC, a North Carolina limited liability company (“DATA”).

WITNESSETH:

WHEREAS, the City is the owner of that certain real property located in the City of Durham and identified as Lot 4 (hereinafter “Lot 4”) as shown on that plat entitled “[title]” prepared by Jeffrey P. Williams, Professional Land Surveyor, with Coulter/Jewell/Thames, P.A., dated [date], 2013, and last revised on _____, 2013, and recorded in Plat Book [XX], Page [XX-XX] in the Durham County Registry (the “New Plats”), upon which the Durham Performing Arts Center (the “DPAC”) is located; and

WHEREAS, DATA is the owner of that certain vacant parcel of real property located in the City of Durham and identified as Lot 5 (hereinafter “Lot 5”) on the New Plats; and

WHEREAS, the City owns certain exterior HVAC mechanical equipment which serves the DPAC and is located on the rooftop of the DPAC and on Lot 4 between the DPAC and the property line for Lot 5 (the “HVAC Equipment”); and

WHEREAS, DATA, as owner of Lot 5, desires to grant to the owner of Lot 4 certain easement rights in the airspace above the improvements now or hereafter constructed on Lot 5 (the

“Lot 5 Improvements”) for the purpose of maintaining, repairing and replacing the HVAC Equipment, according to the terms set forth herein; and

WHEREAS, the City, as the owner of Lot 4, desires to execute this Easement for the purpose of acknowledging the terms of its use of this Easement.

NOW, THEREFORE, in consideration of the premises; to facilitate the proper maintenance, repair, and replacement of the HVAC Equipment; and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, DATA does hereby grant, bargain, sell, and convey unto the City, its tenants, operators, employees, licensees, customers, business invitees, successors, heirs, and assigns, the following easements, rights, covenants, and undertakings and to which Lots 4 and 5 shall be owned, sold, conveyed, transferred, occupied, and used:

1. Incorporation of Recitals. The foregoing recitals shall constitute an integral part of this Easement, and this Easement shall be construed in light thereof.

2. Air Rights Easement. DATA hereby grants, bargains, sells, and conveys to the City as the owner of Lot 4, a non-exclusive perpetual right, privilege and easement of passage and use of the airspace above Lot 5 and above and beside the Lot 5 Improvements for the swing of the boom of one or more cranes (tower, mobile, and otherwise) and/or for the flight of a helicopter, and related rigging and equipment, as necessary to maintain, repair or replace the HVAC Equipment (the “Air Rights Easement”); provided, however, that: (i) when using a crane, the owner of Lot 4 shall permit only personnel who are properly trained and qualified to operate, supervise and guide such crane(s); (ii) when using a helicopter, the owner of Lot 4 shall permit only personnel who are appropriately licensed to operate such helicopter(s); and (iii) the owner of Lot 4 shall limit use of the Air Rights Easement to only those activities related to the maintenance, repair, or replacement of the HVAC Equipment conducted in the airspace over Lot 5. All costs and liabilities associated with the operation of equipment and personnel required by the owner of Lot 4 to use of the Air Rights Easement shall be borne by the owner of Lot 4 and the owner of Lot 4 shall pay for any damage to Lot 5 or the Lot 5 Improvements caused by reason of activities conducted within the Air Rights Easement by the owner of Lot 4, its agents, employees, or contractors. The owner of Lot 5 shall assume all costs and liabilities associated with any act or omission of the owner of Lot 5, or the tenant(s) or operator(s) of the Lot 5 Improvements, relating to the use of the Air Rights Easement. The owner of Lot 4 agrees to conduct all activities related to the maintenance, repair, or replacement of the HVAC Equipment to be undertaken in the airspace over Lot 5 in a manner so as to minimize any adverse impact on the use and enjoyment of Lot 5 or the Lot 5 Improvements; provided, however, the parties acknowledge that neither the mere existence of any crane(s) and/or helicopter(s), nor viewing of the same from Lot 5, nor the over-swing and/or over-flight permitted hereby, shall be considered to adversely impact the full use and enjoyment of Lot 5 or the Lot 5 Improvements.

3. Construction of Lot 5 Improvements. Before constructing the Lot 5 Improvements, or any additional exterior improvements on Lot 5 which could materially interfere with the Air Rights Easement, DATA (or the applicable owner of Lot 5) shall send to the City (or the applicable owner of Lot 4) a letter of certification from a mechanical engineer reasonably acceptable to the City (or the applicable owner of Lot 4) which specifies that the

improvements to be constructed on Lot 5 will not materially diminish or interfere with the use of the Air Rights Easement and ability of City (or applicable owner of Lot 4) to maintain, repair and replace the HVAC Equipment as contemplated by this Easement.

4. Covenants Running with the Land. The Air Rights Easement and the easements, rights, covenants and undertakings contained within this Easement shall run with the land and be appurtenant to, and for the benefit of, the owner of Lot 4 and shall be a burden upon the title to Lot 5. Any conveyance of Lot 4 or Lot 5, or any portions thereof, shall be subject to the easements, rights, covenants and undertakings contained in this Easement, and, at the time of conveyance, the grantor in any deed of conveyance shall be relieved of future obligations thereafter arising or to be performed by the owners of the Lot or property interest so conveyed. Any grantee from City or Data, as applicable, or their successors, heirs, operators, or assigns, by recordation of a deed or other instrument of transfer or conveyance, shall be deemed to have assumed the obligations under this Easement with respect to such Lot.

5. Amendment and Termination. This Easement may be modified, amended or terminated only by written agreement of the owners of Lot 4 and Lot 5, and any portions thereof which are hereafter subdivided and separately conveyed, and shall be duly acknowledged in a manner suitable for and effective upon recording in the Office of the Register of Deeds of Durham County, North Carolina.

6. Governing Law. This Easement shall be governed by and construed in accordance with the laws of the State of North Carolina without regard to principles of conflict of laws.

7. No Public Dedication; No Third Party Beneficiaries or Consents. This Easement is not intended, and shall not be construed: (a) as a dedication to the public of any interests in the Air Rights Easement described herein, (b) to give any member of the public, or any party other than as provided herein, any right whatsoever herein or therein or (c) to require any consent or other action of any other party other than as expressly provided herein to any amendment to or waiver of any provision of this Easement.

8. Severability. This Easement is intended to be performed in accordance with, and only to the extent permitted by, all applicable laws, ordinances, rules and regulations. If any provision of this Easement or the application thereof to any person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, but the extent of such invalidity or unenforceability does not destroy the basis of the bargain expressed herein, the remainder of this Easement and the application of such provision to other persons or circumstances shall not be affected thereby, but rather shall be enforced to the greatest extent permitted by law.

9. Compliance Certificate. Upon the written request of the owner of Lot 4, Lot 5, or any portion thereof, or the holder of any first lien deed of trust or first lien mortgage on any such parcel, any such owner shall execute, have acknowledged and deliver a certificate stating whether, to the knowledge of the signatory party, the requesting party is otherwise in compliance with this Easement.

10. Waiver. This Easement may not be waived orally or impliedly, but only by written document executed by the party against which such waiver is sought. Neither the failure of a party to complain of any violation of this Easement, regardless of how long such failure continues, nor the failure of a party to invoke (or the election by a party not to invoke) any right, remedy or recourse for a violation hereof, shall extinguish, waive or in any way diminish the rights, remedies and recourses of the party with respect to such violation. No waiver by a party of any provision of this Easement shall be deemed to be a waiver of any other provision hereof.

11. Rights Cumulative. All rights, powers and privileges conferred hereunder shall be cumulative and in addition to, and not to the exclusion of, those provided at law or in equity. No breach of the provisions of this Easement shall entitle any party to cancel, rescind or otherwise terminate this Easement.

12. Counterparts. This Easement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which taken together shall be considered as one and the same instrument.

13. No Merger. In the event that there is an identity of interest between an owner of a Lot and another interest in the land, such that the interests are identical or mutual, no merger of such interests shall be deemed to occur.

14. Headings. The paragraph headings in this Easement are for convenience only, and shall in no way define or limit the scope or content of this Easement, and shall not be considered in any construction or interpretation of this Easement or any part thereof.

TO HAVE AND TO HOLD the aforesaid Air Rights Easement and all privileges and appurtenances thereunto belonging to the City as Grantee.

And DATA covenants with the City that DATA has done nothing to impair such title as DATA received, and DATA will warrant and defend the title against the lawful claims of all persons claiming by, under, or through DATA.

[Signature page follows]

IN WITNESS WHEREOF, the City has executed this Easement as of the day and year first above written.

Attest:

City of Durham

Name: _____
Title: City Clerk

By: _____
Thomas J. Bonfield, City Manager

STATE OF NORTH CAROLINA

COUNTY OF _____

I, a Notary Public of _____ County, North Carolina, certify that _____ (the "Signatory") personally came before me this day and acknowledged that (s)he is the City Clerk of the City of Durham, North Carolina and that by authority duly given and as the act of said City, the foregoing instrument was signed in its name by the City Manager of the City of Durham, North Carolina and attested by (him/her) as City Clerk to the City of Durham, North Carolina.

The Signatory acknowledged to me that (s)he voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated.

Witness my hand and official stamp or seal, this the ____ day of _____, 2013.

Notary Public

Print: Name: _____
[Note: Notary public must sign exactly as on notary seal]

My Commission Expires: _____
(MUST BE FULLY LEGIBLE)

(Notarial Stamp/Seal)

IN WITNESS WHEREOF, DATA has executed this Easement as of the day and year first above written.

DATA RESIDENTIAL, LLC, a North Carolina limited liability company

By: Capitol Broadcasting Company, Incorporated, a North Carolina corporation, its Manager

By: _____
Michael J. Goodman, Sr.
Vice President

STATE OF NORTH CAROLINA

COUNTY OF _____

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated:

Michael J. Goodman, Sr., Vice President of Capitol Broadcasting Company, Incorporated, Manager of DATA RESIDENTIAL, LLC

Date: _____, 2013 Official Signature of Notary: _____
Notary's printed or typed name: _____

My commission expires: _____

(Official Seal)